IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC**

DEFENDANTS' MOTION TO COMPEL PRODUCTION OF EXPERT MATERIALS AND INTEGRATED BRIEF

EXPEDITED CONSIDERATION REQUESTED

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Defendants respectfully move the Court for an Order compelling Plaintiffs to produce all expert-considered materials, including any and all survey information, generated in support of Plaintiffs' expert damages analysis. Access to these materials is critical to Defendants' ability to analyze and rebut Plaintiffs' claim; the information is unique and Defendants can neither duplicate it nor obtain it elsewhere. In addition, in light of the hundreds of thousands of pages of materials actually disclosed with Plaintiffs' expert NRD reports, Plaintiffs' delay of nearly a month in making their disclosures, and their refusal to supply survey materials on which their experts rely, Defendants request an extension of the current March 2, 2009 deadline to June 2, 2009 to serve Defendants' expert reports on damages.

For almost four years Plaintiffs have vaguely alleged that Defendants caused extensive "damage" to the Illinois River Watershed ("IRW"). On January 5, 2009, Plaintiffs were required to identify the environmental damages they seek to recover in this case. Plaintiffs' damages reports, however, amount to little more than the opinions of paid expert witnesses, and fail to identify any *actual* loss or injury to the State or its residents. People continue to use and enjoy the waters in the IRW and Plaintiffs' damage reports do not identify any costs incurred by the State to address, clean up or remediate the IRW.

Nonetheless, Plaintiffs now propound a $610 Million "passive use" damage claim. In essence, Plaintiffs' experts went door-to-door to approximately 2,000 residences across the State, provided them with misleading descriptions of the "problem" in the IRW and asked them *hypothetically* what they would be willing to pay in increased taxes to restore the water to 1960 conditions. Plaintiffs' experts then took the per household average and multiplied it by the number of households in the survey area and concluded based upon this inaccurate survey that Defendants should pay $610 Million in "natural resource damages" ("NRD"). Not only is the

reliability of this inherently biased method suspect, it ignores the regulatory program pursuant to which litter is legally applied, and posits unrealistic injury, damage, and cleanup scenarios.

In short, Plaintiffs' $610 Million "damage" claim is purely hypothetical and not grounded in fact. Defendants must nevertheless take this claim seriously and prepare a defense to it. To do so requires that Defendants be allowed full access to all information, data, and documents related to the surveys conducted by Plaintiffs' experts and the polling firms working for those experts.

I. PROCEDURAL BACKGROUND

A. PLAINTIFFS' DISCLOSURE

On January 5, 2009, the deadline for Plaintiffs' damages expert disclosures (Dkt. No. 1376 at 2), Defendants received a letter from Plaintiffs identifying seven "testifying experts" on damages. (Ex. 1: Jan. 2, 2009 C. Xidis Ltr.) That same day, Defendants received from Plaintiffs a hard drive and CD with various materials. (Id.; Ex. 2: Jan. 5, 2009 D. Page Ltr.) The cover letter accompanying the hard drive indicated that the hard drive did not include some email attachments and some recent email correspondence considered by its damages experts. (Ex. 1 Jan. 2, 2009 C. Xidis Ltr.) On January 8, 2009, Defendants received a second CD containing what Plaintiffs purported to include all of the remaining expert-considered materials. (Ex. 3: Jan. 7, 2009 Xidis letter.)

B. PLAINTIFFS' NRD REPORT

Plaintiffs spent more than two and a half years and (it appears) more than $4.5 million in developing their damages reports, which assert past and future damages of more than $610 million. (Desvousges Decl. ¶¶ 7, 13.) The expert materials provided by Plaintiffs in support of this contention exceed twelve and a half (12.5) gigabytes of data, the equivalent of an 800,000-

page Microsoft Word document. (Ex. 4: LEXIS Info. Services Sheet.) Included in these materials are two natural resource damages assessment (NRDA) reports prepared by Stratus Consulting, Inc. (Stratus), the coordinator Plaintiffs' expert damages consortium. (Desvousges Decl. ¶¶ 4, 5.) These reports and their appendices total more than 700 pages in length. (Id. ¶ 4.) The considered data supporting the reports includes over 13,000 individual data files, including approximately 1,400 Microsoft Word documents, 3,900 emails, 500 Microsoft Excel spreadsheets, and 4,300 Adobe Acrobat files. (Id. ¶ 21.) The work involved seven testifying experts, three survey firms, and dozens of other individuals and entities. (Id. ¶ 5.) Defendants' damages expert estimates that between fifty and seventy-five individuals worked on Plaintiffs' NRDAs. (Id.)

The accuracy of Plaintiffs' huge damages figure is highly dependent on the validity and reliability of the contingent valuation ("CV") methodology their experts used to calculate damages. (Id. ¶ 4, 8-13, 17-20.) Before arriving at this CV approach to NRD damages, however, Plaintiffs tried two other approaches to such damages.

1. The "Intercept" Survey

In their first survey, conducted by Stratus between May and September of 2006, Plaintiffs' interviewers talked to approximately 400 people while they were actually at the recreational waters of the IRW (swimming, boating, etc.) and asked them questions about their recreational use habits to try to determine a relationship between the alleged injury to these water bodies and recreational use. (Desvousges Decl. ¶ 15.) The intercept survey records that have been produced show that most of the individuals surveyed had a positive impression of the Illinois River and Lake Tenkiller for recreational uses. (Id.) These results were not beneficial to

Plaintiffs' position, are not included in the final NRD reports, and likely influenced Plaintiffs' decision to use a CV methodology. (Desvousges Decl. ¶ 15.)

2. The Telephone Survey

In their second survey, conducted by Consumer Logic, Inc. in November 2006, interviewers conducted telephone interviews of approximately 400 people (after attempting to contact more than 4,000) to test the respondents' knowledge and use of Lake Tenkiller and the Illinois River, their perceptions of water quality issues related to these water bodies, and their impressions of the poultry industry.

This second survey also found few public concerns over water quality in the IRW. Plaintiffs' expert Dr. Rich Bishop, describing lessons "learned" from the preliminary 2006 telephone survey results stated, "A variety of 'impressions' were expressed, with water quality issues present but not too strong." (Ex. 5 : Morey0000131.) Similarly, Plaintiffs' expert Dr. Edward Morey commented: "If estimated damages are to be significant, people will have to be educated about the injuries. There is currently not a lot of knowledge of the injuries." (Ex. 6 : Morey0000133.)

Like the intercept survey, when the telephone survey results were not beneficial to Plaintiffs' position, were excluded from Plaintiffs' final NRD reports, and likely influenced Plaintiffs' decision to use a CV methodology. (Desvousges Decl. ¶ 16.)

3. The CV Report

After reviewing the results of the intercept and telephone surveys, and subsequent focus groups and other test and pilot surveys, Plaintiffs adopted a "contingent evaluation" approach to NRD for their third survey. Under this approach, surveyors for Westat conducted in-person interviews at interviewees' houses in September through December of 2008, following a series

of one-on-one interviews, focus group, test, and pilot surveys conducted in 2006, 2007, and 2008; Consumer Logic, Inc. and Wilson Research Strategies, Inc. were also involved in this work. (Ex. 7: NRDA at 3.1 – 3.10.)

Before conducting the CV survey, interviewers were trained by Plaintiffs' experts to make sure interviewees "learned" a number of things from interviewers, including (1) "more about the geography and characteristics of the river and lake," (2) "how the lake has changed since around 1960," (3) "who investigated the injury and ... the causes of changes in the river and lake," (4) "about the state's proposed actions to reduce phosphorous in the river and lake," (5) "that alum treatment of the river and lake could reduce the excess phosphorous faster," (6) "that alum does not harm humans and that humans have been using alum for many years," (7) "how effective the alum treatments would be at reducing phosphorous in the river and lake," and (8) "about the payment vehicle: the Oklahoma state income tax." (Id. at 4-6, 4-10, 4-14, 4-16–4-18, 4-22, and 4-27.)

Interviewers then went to selected households in person and conducted interviews lasting between 30 and 60 minutes. (Id. at 5-15.) Interviewers asked several dozen questions and showed participants laminated 8 ½ by 14 cards and a booklet of 21 "show cards," which included maps, timelines, and picture sets, and recorded answers on computers and other media. (Id. at 4-38, 5-12, 5-13, 5-15.) For example, Plaintiffs' interviewers "educated" survey participants about alleged "excess algae" in various scenic rivers (id. at 4-16), told them that introduction of alum into the water would result in "a lot less algae" (id. at 4-19), and then asked how much their household would pay in a one-time tax to introduce alum into the water (id. at 4-28).

C. DEFENDANTS' EFFORTS TO OBTAIN THE INFORMATION WITHHELD BY PLAINTIFFS

While working their way through the immense volume of materials produced with Plaintiffs' NRD report, Defendants and their expert noted a number of omissions. On January 21, 2009, Defendants identified to Plaintiffs and requested production of a number of materials likely considered by Plaintiffs' testifying experts but omitted from Plaintiffs' January 5 and 8 expert productions. This list included "all materials as to the identity of, and contact information for, the survey participants and ... the transcripts, videotapes and/or audio tapes of interviews of such survey participants." (Ex. 8: Jan. 21 & 23, 2009 email chain between D. Ehrich and C. Xidis.)[1] Plaintiffs responded that they had provided all materials considered by their experts and refused to provide the identity of their survey participants. Specifically, Plaintiffs' counsel asserted:

> The only information the authors of the Stratus report had regarding the identity of the survey participants was an identification number .... the Stratus authors' only way of identifying particular survey respondents was by this number .... the identity of the respondents was not provided to Stratus authors .... it was not part of their considered materials.

(Ex. 8: Jan. 21 & 23, 2009 email chain between D. Ehrich and C. Xidis.)

On January 27, 2009, Defendants identified and requested another list of considered materials Defendants omitted from Plaintiffs' original disclosure, including an outdoor recreation

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[1] This information includes: (1) the names, addresses, and any other identifying information corresponding to each of the 441 persons intercepted, including the 395 individuals ultimately surveyed as part of the May-September 2006 Lake Tenkiller and IRW Use Intercept Survey conducted by Plaintiff in preparation for this litigation; (2) the names, addresses, and any other identifying information corresponding to each of the 4,312 contacts attempted and including the 400 surveys completed for the November 2006 telephone survey conducted by Plaintiff in preparation for this litigation; (3) the names, addresses, and any other identifying information corresponding to each of the 3,263 households in the final sample, including the 2,885 households contacted, the 1,793 persons for whom screener interviewers were completed, and the 1,673 persons for whom a base or scope interview was completed; and (4) any record, electronic, or otherwise, of the focus groups or other formal or informal surveys conducted by Consumer Logic, Inc. or Wilson Research Strategies, Inc.

report that had only been provided in a corrupted and inaccessible electronic file format and various password protected electronic files. (Ex. 9: Jan. 27 & 29, 2009 email chain between D. Ehrich and C. Xidis.) Defendants also requested Plaintiffs provide a "listing of all sample housing units." (Id.)

On January 28, Defendants' and Plaintiffs' counsel met and conferred on the outstanding disclosures due to Defendants, including the survey data Defendants requested on January 21, 2009. Afterward, Plaintiffs' counsel confirmed that some files provided were password-protected, provided the passwords, indicated for the first time that these password-protected files were duplicated elsewhere, and acknowledged that the corrupted file was in fact inaccessible. (Ex. 9: Jan. 27 & 29, 2009 email chain between D. Ehrich and C. Xidis.) Counsel again refused to provide the survey data requested by Defendants, including the listing of all sample housing units, arguing they were not "considered" materials. (Id.) Plaintiffs' counsel later asserted the information was also "confidential" and "irrelevant." (Ex. 10: Feb. 6, 2009 Moll Ltr.)

On January 29-30, 2009, Defendants noticed depositions of and issued subpoenas to Plaintiffs' survey firms: Westat, Inc., Consumer Logic, Inc., and Wilson Research Strategies, Inc. (Ex. 11: Subpoena Notices.) Consumer Logic, Inc. initially raised no objections and requested additional time to respond, (Ex. 12 Feb. 3, 2009 Hixon Ltr), but later changed its position after Plaintiffs objected to the release of the data and indicated that they would seek to quash the subpoenas. Westat objected to the subpoena as (1) overly broad and unduly burdensome, (2) seeking information protected by attorney-client privilege or work product status (noting "Westat has been retained [by Plaintiff] as a non-testifying expert"), (3) seeking "confidential information, including the identities of the survey respondents and interviewers,"

and (4) seeking information "not relevant to the claims and defenses asserted in the Underlying Case or reasonably designed to lead to discovery of admissible evidence." (Ex. 13: Westat Obj.)

Consumer Logic likewise refuses to provide the requested materials, contending that it is "contractually prohibited from producing the requested information" because it is "contractually obligated to Stratus Consulting, Inc. to keep the work product in question in the 'strictest confidence.'" (Ex. 14: Feb. 6, 2009 Robinett Ltr.) Wilson offers a similar objection. (Ex. 15: Feb. 9, 2009 Leonard Ltr.)

On February 3, 2009, with half of Defendants' response period already past, counsel for Plaintiffs finally provided to Defendants an uncorrupted version of the outdoor recreation report considered by Plaintiffs' testifying damages experts. (Ex. 16: Feb. 3, 2009 Xidis email.) Despite Plaintiffs' assertion that the January 2009 meet and confer was sufficient "to satisfy the court's meet and confer requirement," Defendants again engaged Plaintiffs in early February in one last effort to convince Plaintiffs their disclosures were deficient. (Ex. 17: Feb. 10 & 12, 2009 email chain between D. Ehrich and C. Xidis.) Despite Defendants' citation to Plaintiffs' own expert materials to support the request, Plaintiffs again refused to provide the information, leaving Defendants no choice but to file this motion. (Ex. 17: Feb. 10 & 12, 2009 email chain between D. Ehrich and C. Xidis.) As of the date of this motion, Plaintiffs have not responded to Defendants' request for their consent to Defendants' motion to extend the deadline for filing their expert reports on damages.

II. DISCUSSION

A. THE COURT SHOULD COMPEL PLAINTIFFS TO PRODUCE ALL MATERIAL ON WHICH PLAINTIFFS' EXPERTS BASE THEIR OPINIONS, INCLUDING THE SURVEY INFORMATION.

Defendants are entitled to the materials that form the foundation of the Plaintiffs' expert reports. Federal Rule of Civil Procedure 26 requires experts to "submit an expert report, which, in turn, must disclose, inter alia, the 'data or other information considered by the witness in forming the opinions.'" Synthes Spine Co. v. Walden, 232 F.R.D. 460, 462 (E.D. Pa. 2005) (quoting Fed. R. Civ. P. 26(a)(2)(B)(ii)). "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Fed. R. Civ. P. 26 advisory committee's note to 1993 amendments.

> This Rule should lead counsel to "expect that any written or tangible data provided to testifying experts will have to be disclosed." 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2031.1 (1994). A claim that material might be exempted from disclosure because it was not considered by the expert "would ordinarily be viewed skeptically where counsel provides a retained expert with materials in the evident expectation that they would be pertinent to the case." Id.

Loff v. The Landings Club, Inc., 2006 WL 5537588, at *1 (S.D. Ga. Jul. 17, 2006).

1. Defendants are Entitled to Review All of the Survey Materials to Test the Reliability of Both the Survey Method and Its Execution and to Effectively Cross-Examine Plaintiffs' Experts.

Defendants and their experts cannot fully and effectively defend against Plaintiffs' experts' NRD report resting on survey data without full access to all survey information, and the Court should compel Plaintiffs to produce that information.

Survey data is the bailiwick of experts. See United States v. Dentsply Int'l, Inc., 2000 WL 654378, at *5 (D. Del. May 10, 2000) ("[T]he Advisory Committee Notes to the Federal Rules of Evidence support the notion of survey evidence as expert material, suggesting that the best framework for determining the admission of survey evidence is as a basis of expert

testimony pursuant to Federal Rule of Evidence 703."). "[S]urveys, since they involve hearsay, must be conducted with proper safeguards to insure accuracy and reliability." Pittsburgh Press Club v. United States, 579 F.2d 751, 758 (3d Cir. 1978).

Information about the method in which a survey was taken is as important to the issue of the survey's reliability and admissibility as the data the survey produces. "It is essential that the sample design, the questionnaires *and the manner of interviewing* meet the standards of objective surveying and statistical techniques." Id. (emphasis added). "Obviously the value of a survey depends upon the manner in which it was conducted—whether the techniques used were slanted or fair." Rhodes Pharmacal Co. v. Fed. Trade Comm'n, 208 F.2d 382, 387 (7th Cir. 1953), rev'd in part on other grounds, 348 U.S. 940 (1955). "[A] poll might well be inadmissible if, for example, the questions were 'unfairly worded to suggest answers favorable to the party sponsoring the survey', because in such a case the circumstantial guarantees of trustworthiness would be lacking." Pittsburgh, 579 F.2d at 758-59; see e.g., Gen. Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716, 736-38 (W.D. Mich. 1964) (excluding survey because of poor technique and leading question).

Defendants have a right to the survey information necessary to test the reliability of the expert evidence offered. Here, there is no question that Plaintiffs' experts' NRD opinions rest directly on the results of the CV survey; the survey information is central to the case, and Plaintiffs concede their testifying experts were given identification numbers corresponding to each survey participant.

a. Plaintiffs have waived any work product or non-testifying expert protection in the information sought.

Plaintiffs rest their objections to producing this information on claims of work product protection and the protection afforded to opinions of non-testifying experts under Rule

26(b)(4)(B). (Ex. 10: Feb. 6, 2009 Moll Ltr.; see, e.g., Ex. 18: Obj. and Responses to Peterson Farms's Mar. 30, 2007 Interrogs. & Requests for Prod. At Interrog. 9 and Request for Prod. 8.) This Court has already considered those objections with respect to Plaintiffs' earlier efforts to withhold sampling and scientific information and found that Plaintiffs had waived any claim of protection by placing at issue the claims supported by that information. In its January 5, 2007 Order, this Court set out the following test for determining Plaintiffs' obligation to respond to discovery requests concerning data Plaintiffs had gathered from soil, water, and other sampling:

> 1. Whether the assertion of the privilege is the result of some affirmative act, such as filing suit or asserting an affirmative defense, by the asserting party.
>
> 2. Whether the asserting party, through the affirmative act, put the protected information at issue by making it relevant to the case.
>
> 3. If the privilege was applied, would it deny the opposing party access to information that was vital to the opposing parties defense.

Dkt. No. 1016 at 6 (citations omitted).

The Court concluded that Plaintiffs met the first factor "by the affirmative act of filing the lawsuit." Id. As to the second factor, despite Plaintiffs' effort to argue that the sampling data was "peripheral," the Court concluded that "Plaintiffs have, through an affirmative act, put the information at issue and have relied upon the information in the First Amended Complaint." Id. at 7. Finally, the Court concluded that the third element was satisfied because Defendants sought "sampling data and results that cannot be recreated and can be obtained from no other source than Plaintiffs." Id.

The survey information at issue here presents an identical analysis and result. Plaintiffs satisfied the first element by filing suit. Plaintiffs have also satisfied the second element by claiming natural resource damages in their Second Amended Complaint.

(See Second Am. Compl. ¶¶ 1, 84-88.) Plaintiffs rely on the NRD expert opinions in support of that claim, and those in turn rely on the surveys whose underlying information is at issue here. Finally, there can be no question that the information concerning Plaintiffs' method of conducting the survey is vital to Defendants' defense of the case, and that the information about how the surveys were conducted is only available through Plaintiffs and through follow-up with survey participants whose identities and contact information only Plaintiffs have. See also Fed. R. Civ. P. 26(b)(4)(B) (permitting a party to discover "facts known or opinions tested" by a non-testifying expert "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means").

The testimony of Plaintiffs' damages experts is inextricably linked to the validity and reliability of the surveys at issue, and if the survey data is flawed or biased, the testimony of Plaintiffs' damages expert may be subject to exclusion. See J.B. Hunt Transport, Inc. v. Gen. Motors Corp., 243 F.3d 441, 444 (8th Cir. 2001) (excluding expert testimony that is "inextricably linked" to the excluded testimony of another expert). The three elements are satisfied, and the Court should order disclosure here just as it did for the sampling data.

b. The information sought is not work product.

In addition, much of what Defendants seek could not be characterized as attorney work product under any circumstances. The bulk of what Defendants seek are *facts* gathered or employed by Plaintiffs' experts, specifically the names of survey participants and the other survey information. Such facts do not constitute attorney work-product and may be discovered by an adverse party. See, e.g., Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) ("[T]he work product doctrine is intended only to guard against divulging the attorney's

strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product.") (citing Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 89 (W.D. Okla. 1980)); Atl. Richfield Co. v. Current Controls, Inc., 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997) (finding that the facts gathered by the experts were not privileged attorney work product and could be discovered "by, for example, serving, interrogatories on ARCO and/or by deposing the consultants"); Horan v. Sun, 152 F.R.D. 437, 437-39 (D.R.I. 1993) (ordering a party to respond to an interrogatory which sought the results of various environmental assessments and tests). Thus, the information sought is in any event "otherwise discoverable" under Rule 26(b)(1).

c. The materials sought are "considered" materials.

Plaintiffs also object to production on the ground that the information Defendants seek is not information that their testifying experts "considered." (Ex. 8: Jan. 21-23, 2009 email exchange between D. Ehrich and C. Xidis.) Even if Plaintiffs were not otherwise required to disclose this information, as described above, they could not claim the protection of this provision. Only by the most narrow, technical, and semantic reading of the Rule can Plaintiffs argue that their experts did not "consider" these materials.

Plaintiffs claim Defendants are not entitled to the names of the survey participants because Plaintiffs' survey experts were "subcontractors" who never disclosed the names to its testifying experts, but instead provided identification numbers representing each survey respondent's name. Plaintiffs argue this lack of disclosure by their non-testifying experts means their testifying experts never "considered" the names in preparing their expert opinions.

The CV survey on which Plaintiffs' testifying experts' opinions is based is the centerpiece of Plaintiffs' NRD damages case. If Plaintiffs intend to actually introduce or rely on

the results of the survey at trial, *someone* with full knowledge is going to have to testify in support of the survey's method and validity. Plaintiffs' testifying experts say that they relied on the professional judgment of Plaintiffs' survey firms to properly administer its surveys (id.), putting the soundness of the survey firms' judgment squarely at issue.

Where "there are serious questions concerning the reliability of the conclusions reached by another member of the team and it is beyond the expertise of the team leader to answer those questions, the team leader's testimony is insufficient. The team member must defend his or her own opinions." Fed. Courtroom Evid. § 703 (2008); see also Weinstein's Evid. Manual § 13.03 (2008) ("If ... the soundness of an expert judgment made by one of the team members is at issue, that member must testify for that judgment to be admissible."); see also Dura Auto Sys. of Ind. v. CTS Corp., 285 F.3d 609, 612-15 (7th Cir. 2002) (stating that a contrary result would allow one expert witness to become another's "mouthpiece" and allow the testifying expert to avoid reliability analysis of the team members' conclusions).

Thus, if Plaintiffs want to introduce their survey evidence and the opinions that rest on it, *someone* will have to testify to the survey's methods and application, and the foundation of that testimony must necessarily involve knowledge of *all* the information underlying the survey. Put conversely, if Plaintiffs stand by their assertion that none of their testifying experts has considered all of the underlying survey materials, they appear unlikely to be able to lay the foundation necessary to get the survey opinions into evidence at all.

The underlying survey information is plainly part of the testifying experts' considered materials, and Plaintiffs' tactic of providing those experts with coded versions of the information neither alters that fact nor protects the information from disclosures. Defendants are entitled to

the equivalent of a "decoder ring" for that considered material so that Defendants may test the validity and reliability of the opinions of Plaintiffs' testifying experts.

2. Contrary to Their Assertion, Plaintiffs Already Provided At Least Four of Plaintiffs' Testifying Damages Experts With the Names and Telephone Numbers, and Other Information of Survey Participants.

Even assuming for the sake of argument that the Rules permitted Plaintiffs and their experts to conceal the identities of the survey participants because Plaintiffs' testifying experts had never seen this information, Plaintiffs argument nevertheless fails because several of those experts in fact not only saw but used this information.

Plaintiffs base their refusal to produce identifying information for the survey participants large part on their assertion that "[t]he only information the authors of the Stratus report had regarding the identity of the survey participants was an identification number .... the Stratus authors' only way of identifying particular survey respondents was by this number .... *the identity of the respondents was not provided to Stratus authors* ...." (Ex. 8: Jan. 21-23, 2009 email chain between D. Ehrich and C. Xidis (emphasis added).) This assertion is simply false.

According to the materials disclosed thus far, at least four of Plaintiffs' testifying experts were provided with the first and last names, telephone numbers, addresses, interviewer name, number of contacts, date of last contact, electronic records of comments ("EROC"), and other identifying information for at least 189 of the CV survey participants. (Ex. 19: BishopCORR0000126 & attached spreadsheet "case_interimRefusal3_Revise.zip). Plaintiffs' experts Dr. Richard Bishop, David Chapman, Dr. Jon Krosnick, and Dr. Roger Tourangeau received this information from Westat, Inc. on December 1, 2008, when Westat distributed a file containing the contact information of people who had initially declined to complete the CV survey. (Id.)

Plaintiffs' testifying experts did not receive this data by happenstance or through oversight; they asked for it and they used it. In fact, in November 2008, Plaintiffs' testifying expert Krosnick, apparently concerned about a low survey-response rate, initiated a discussion with fellow testifying expert Chapman concerning "[c]alling respondents to encourage them to be interviewed," and to "[d]iscuss field notes on refusals." (Ex. 20: KrosnickCORR0001352-53.) Westat distributed the password-protected data file of survey participants with names and phone numbers to Krosnick, Tourangeau, Bishop, and Chapman, among others, explaining to Bishop: "Attached are the files containing telephone numbers for refusals. [Chapman] will be sending an email shortly with more instructions." (Ex. 19: BishopCORR0000126.) Chapman then instructed Krosnick, Tourangeau, and Bishop: "Rich takes the 1st 1/3, Roger takes the next, Jon takes the final 1/3." (Ex. 21: KrosnickCORR0001356.) Krosnick even crafted and circulated to Tourangeau and Bishop a script to use when making calls. (Ex. 22: KrosnickCORR0001358.)

On December 2, 2008, at Chapman's request, Westat instructed Krosnick and Chapman "about best places to concentrate doing the refusal conversion calls in/to" and provided them with a list of specific geographic locations (towns) along with the names and telephone numbers of household members in the survey sample. (Ex. 23: BishopCORR0000125.) Plaintiffs' experts were told "It is your call about which cases to call and try to convert." (Id.) That same day, Tourangeau reported, "I tried to contact the cases in my group in the areas [Westat personnel] identified. The results are described in the attached zip file (see the column I added). I did convert one case, who expects someone to come by in the early afternoon tomorrow." (Ex. 24: TourangeauCORR0000431.) To date, Defendants have been unable to locate the Tourangeau-referenced zip file in Plaintiffs' expert disclosures.

Thus, at least four of Plaintiffs' experts were directly involved in viewing *and using* personal identifying information for each survey subject. Hence, Plaintiffs' assertion that their experts were not provided such information and Plaintiffs' claims of irrelevance and "confidentiality" are belied by their own records. Indeed, Plaintiffs' NRDA on CV provides: "Two members of the Team (Dr. Krosnick and Dr. Tourangeau) made refusal conversion telephone calls." (Ex. 7 NRDA at 5-16.)

Although the volume of Plaintiffs' expert disclosures and Plaintiffs' delay in producing them has limited the amount of these materials Defendants have reviewed to date, even this preliminary review makes evident that Plaintiffs' experts engaged directly in the administration of the CV survey, and at least Tourangeau's involvement shaped the response rate and consequently the results of the CV survey. This is the same work Plaintiffs now describe as the work of their "subcontractor" and which Westat describes as the work of "a non-testifying expert." (Ex. 10: Feb. 6, 2009 Moll Ltr & Feb. 5, 2009 Westat Ltr.) Both characterizations are patently wrong; by definition, the involvement of a testifying expert in the underlying work makes the resulting handiwork the work product of the testifying expert.

Plaintiffs opened the door to Defendants' discovery of the survey participant names when they chose to directly involve at least four of their experts in the CV survey work. Defendants are entitled to investigate the role of those experts in shaping the data that resulted. Without access to the identifying information of all of the survey participants, Defendants' damages experts will not be able to compare the results of survey data obtained after Plaintiffs' testifying experts telephoned individual survey targets with those results obtained where Plaintiffs' testifying experts were not involved. Such a limitation would prohibit Defendants' damages experts from analyzing any resulting validity or reliability issues resulting from the involvement

of Plaintiffs' testifying experts. Further, Defendants' experts also need this information and the remaining information requested by Defendants to (1) determine the effect of the survey questionnaire design on the interviewees' responses and Plaintiffs' damages calculations, (2) determine the rationale behind the selection of a CV methodology after completing the recreational use intercept and telephone surveys, and (3) to access the same information available to survey participants during the CV interviews to understand the totality of the information presented to the survey participants. (Desvousges Decl. ¶ 25.)[2]

3. Plaintiffs' Confidentiality Concerns Do Not Justify Concealment of the Survey Information, and the Court Can Sufficiently Address Any Legitimate Privacy Concerns of Survey Participants.

The confidentiality concerns raised by Plaintiffs and their survey contractors do not justify concealing crucial evidence from Defendants, and in any event can be addressed by an appropriate Protective Order. A "plaintiff should not be able to conduct a survey for litigation and subsequently protect the survey from scrutiny by promising confidentiality to the participants." U.S. Surgical Corp. v. Orris, Inc., 983 F. Supp. 963, 970 (D. Kan. 1997). This is

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[2] Defendants also seek to compel disclosure of survey materials necessary to test non-response bias, including 1) the date of last contact, 2) the number of times that Plaintiffs contacted each participant identified by each respondent, interviewer name, and the EROC for each participant, and 3) the "Record of Actions" identified on page 4-38 of the expert report pertaining to the CV study. (Desvousges Decl. ¶ 26.)

Plaintiffs contacted hundreds of participants more than three times before they received a response, (Ex. 7 NRDA at F.2), and some as many as ten or more times without a response. (Ex. 19 :BishopCORR0000126 and attached spreadsheet "case_interimRefusal3_Revise.zip"). The number of contacts may impact on non-response bias and must be tested. (Desvousges Decl. ¶ 26.) Additionally, all of this information (for the 189 respondents on the conversion refusal call list), except for the Record of Actions, was provided to Plaintiffs' testifying experts in December 2008. (Ex. 19:BishopCORR0000126 and attached spreadsheet "case_interimRefusal3_Revise.zip.") Finally, Defendants seek audiotapes which it believes may exist for focus groups and possibly other testing conducted by the survey firms. For example, Consumer Logic, Inc.'s focus groups in March/April and October of 2007. (Ex. 25: Chapman0000166, 183.)

particularly true where the "[p]laintiff has placed the survey's underlying data directly in issue by relying on the survey ...." Id. (affirming magistrate judge's determination "that defendants' need to properly evaluate and rebut the reliability of the survey outweighed plaintiff's interest in shielding the survey participants"); see also, e.g., Static Control Components, Inc. v. Lexmark Int'l, Inc., 2007 WL 102088, at *4, *7 (E.D. Ky. Jan. 10, 2007) (affirming magistrate judge's order directing the plaintiff "to disclose the identity of the actual participants in the [survey]" used by plaintiff's expert); accord In re Jobe Concrete Prods., Inc., 101 S.W.3d 122, 125-26, 128-29 (Tex. App. 2002) (finding a clear abuse of discretion where the trial court declined to order the plaintiff to disclose names and telephone numbers of survey participants withheld from plaintiff's expert, finding that "without the identities or telephone numbers of the survey participants, [defendants] will be unable to identify and contact the participants and develop a record showing the inadequacy of the survey relied upon by [plaintiff's expert]").[3] Defendants' only interest in the survey information requested is to test the reliability of the methodology underlying Plaintiffs' damages figure, and the tools needed to conduct this test, including the ability to recontact the persons contacted by Plaintiffs' experts during their focus groups, pre-tests, one-on-one interviews, pilots, and survey work.

Defendants have no desire or intention to embarrass or harass the survey participants, any more than Plaintiffs intended to do so in the original surveys. Defendants are sensitive to the concerns of the survey firms over the release of this information, and have no objection to the Court taking reasonable measures to protect the further dissemination of the information.

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[3] The need to test these aspects of Plaintiffs' surveys is especially acute given that the surveys' sponsor was not a private entity but the State of Oklahoma and where the participants were asked about the value of public resources in surveys administered by surveyors or interviewers who described themselves as acting on behalf of the State of Oklahoma. (Ex. 7: NRDA at 5-12.)

Indeed, issues of confidentiality in discovery arise often, and courts routinely fashion ways to protect privacy interests while still permitting the discovery to be taken. See, e.g., Static Control Components, Inc., 2007 WL 102088, at *6. Here, the Court might limit the distribution of survey participant identities to its counsel and experts and/or require the parties to protect or redact the names of the participants in any motion practice or at trial. Any need for such measures, however, cannot justify barring Defendants and their experts to full information about the fundamental premise of Plaintiffs' NRD claim.

B. THE COURT SHOULD EXTEND THE TIME FOR DEFENDANTS TO RESPOND TO PLAINTIFFS' DAMAGES EXPERTS

Defendants also ask the Court to extend by three months, until June 2, 2009, the deadline for Defendants to serve their expert reports responding to Plaintiffs' expert reports on damages. A scheduling order may be changed "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Three reasons combine to justify this extension: the scope and volume of the opinions and supporting materials Plaintiffs have produced, Plaintiffs' failure to provide Defendants with any of the data underlying the expert damage reports until January 5, 2009, and Plaintiffs' past and continuing post-deadline failures to provide Defendants with the supporting and reliance information to which they are entitled.

1. The Sheer Magnitude of Defendants' Task

Even if no other factors compelled an extension, Defendants respectfully submit that an extension of the Defendants' damages expert deadline is justified by the sheer size of Plaintiffs' damages expert disclosures, and the consequent time, effort, and expense that Defendants and their experts will have to devote to understanding, analyzing, and rebutting it. As outlined above and as set forth in the declaration of William Desvousges, Plaintiffs and their damages experts have spent two and a half years and over $4.5 million dollars developing their damages opinions,

and have produced the equivalent of hundreds of thousands of pages of opinions and supporting materials and data for Defendants and their experts to sort through.

The present schedule gives Defendants only two months to review, evaluate, and respond to this enormous and expensive effort by Plaintiffs. That schedule, of course, was developed when neither the Court nor the Defendants had any idea of what damages theories Plaintiffs would pursue, much less the volume of material that the opinions would involve. Defendants submit that the Court should grant them a period for response that bears some reasonable proportion to the time that Plaintiffs used to develop the opinions to which the response is necessary.

2. Plaintiffs' Failure to Disclose Data as It Was Developed.

Plaintiffs unnecessarily magnified Defendants' difficulty in dealing with this huge mass of supporting materials by withholding all of that material until the last possible minute: the January 5, 2009 deadline for damages expert disclosure. This concealment violates the spirit if not the letter of the Court's discovery Orders of January 5, 2007 and May 20, 2008. As noted above, the Court's January 5, 2007 Order overruled Plaintiffs' objections to Defendants' discovery requests and directed Plaintiffs to produce sampling results and other scientific data gathered for purposes of the litigation. Dkt. No. 1016 at 6-7. The Court's May 20, 2008 Order expanded on Plaintiffs' obligation and prospectively required Plaintiffs to produce additional sampling results and data within ten days of its creation. Dkt. No. 1710 at 6.

Like the soil and water sampling data, Defendants' discovery requests served in 2006, 2007, and 2008 sought disclosure of most if not all of the underlying data and materials supporting Plaintiffs' damages claims. For example, Defendants' discovery requests sought

information related to or concerning: Plaintiffs' damages calculations and methodologies;[4] models, the information inputted into and out of models, and information used to compare the results received from models;[5] expert materials;[6] complaints about water quality or aesthetics or impacts on: water quality, aesthetics, recreational users, or fisheries;[7] claims or allegations generally;[8] proposals for addressing eutrophication or the causes thereof;[9] and ongoing NRDA methodologies and data.[10]

Despite these discovery requests and the Court's clear Order requiring prompt disclosure of relevant data and information on which experts might later rely, Plaintiffs did not produce any

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[4] See Ex. 18: Objections and Responses of State of Oklahoma ("State") to Separate Defendant Cargill Turkey Production LLC's ("CTP's") Amended First Set of Interrs. and Requests for Prod., Request for Prod. No. 4; Objections and Responses of State to Cobb-Vantress' Second Set of Interrogs. No. 4; Objections and Responses of State to Peterson Farms' Mar. 30, 2007 Interrogs. & Requests for Prod., Interrog. No. 9 & Request for Prod. No. 8; Objections and Responses of State to Simmons Food's July 20, 2007 Interrogs. & Requests for Prod., Request for Prod. No. 4; Objection and Responses of State to Tyson Foods, Inc.'s First Set of Interrogs., No. 2; and Objections and Responses of State to George's and George's Farms' First Interrogs., Interrog. No. 24 and Request for Prod. No 18.

[5] See Ex. 18: Objections and Responses of State to Tyson's Foods, Inc.'s Apr. 17, 2008 Requests for Prod. Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9.

[6] See Ex. 18: Objection and Responses of State to CTP's Am. First Set of Interrogs. & Requests for Prod., Request for Prod. No. 3.

[7] See Ex. 18: Objection and Responses of State of Oklahoma ("State") to CTP's Am. First Set of Interrogs. & Requests for Prod., Requests for Prod. Nos. 21, 39, 44; Objections and Responses of State to Peterson Farms' Requests for Prod. No. 44; Peterson Farms' Mar. 30, 2007 Interrogs. & Requests for Prod., Request for Prod. No. 41; and Objections and Responses of State to Simmons Foods' July 20, 2007 Interrogs. & Requests for Prod., Request for Prod. No. 29.

[8] See Ex. 18: Objections and Responses to the State to CTP's Requests for Prod. No. 3; Objections and Responses of the State of CTP's Am. First Set of Interrogs. & Requests for Prod., Request for Prod. No. 58; Objections and Responses of State to George's & George's Farms' First Interrogs. & Requests for Prod., Interrog. No. 12 & Request for Prod. No. 7.

[9] See Ex. 18: Objections and Response of the State to CTP's Am. First Set of Interrogs. & Requests for Prod., Request for Prod. No. 29.

[10] See Ex. 18: Objections and Responses of the State to Tyson Foods Inc.'s April 25, 2007 Requests for Prod. No. 20.

of the documents or information their survey team developed.[11] Defendants do not raise in this motion the issue of whether Plaintiffs' failure to disclose this data violated the May 20, 2008 Order, or what the consequences of any such violations should be; that is an issue for another day. Plainly, had Plaintiffs disclosed this underlying data as it was generated, as the Court's Orders at least appeared to intend, Defendants would have had and been able to begin analyzing much of this data months ago, which would have (at a minimum) ameliorated the present disproportionate time pressure on Defendants.

3. Plaintiffs' Disclosure Delays Since the January 5, 2009 Deadline.

Finally, Plaintiffs' past and continuing post-deadline delays in providing complete and accessible considered materials has also contributed significantly to the need for an extension of the deadline. As noted, Plaintiffs did not submit all of the required expert disclosures on January 5, 2009. Some materials were provided on January 5, 2009, some on January 8, 2009, password access to others was provided on January 29, 2009, and an additional file was produced on February 3, 2009. (Ex. 1-3, 9, and 16: Jan. 2, 2009 Xidis letter; Jan. 5, 2009 Page letter; Jan. 7, 2009 Xidis letter; Jan. 27-29, 2009 email chain between D. Ehrich and C. Xidis; Feb. 3, 2009 Xidis email.) Thus, even under Plaintiffs' own definition of "considered," the last of their "considered" materials was not delivered until nearly a month after the deadline set forth in the scheduling order.

In addition, as argued above, Defendants contend Plaintiffs continue to withhold materials to which Defendants are entitled.

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[11] While Plaintiffs may argue that if Defendants wanted these materials earlier, Defendants should have moved to compel their production, one would be hard-pressed to explain how Defendants could or should have moved to compel the production of data and information that Defendants did not even know Plaintiffs were generating.

4. The Court Should Extend Defendants' Damages Expert Deadline.

In light of the factors discussed above, and even without respect to the survey information at issue in the motion to compel above, the Court's existing scheduling Order would permit Defendants less than a month after Plaintiffs' completion of their damages expert disclosure to analyze and rebut Plaintiffs' massive expert reports on damages and their supporting materials. Fundamental principles of fairness warrant an extension of the deadline for Defendants' expert reports on damages. Taking into account the critical survey materials Plaintiffs still have not produced, the argument for an extension becomes even more compelling.

As a result, Defendants submit they have shown good cause to modify the existing scheduling order and request the Court extend the deadline for Defendants' Expert Report on Damages to June 2, 2009. Defendants will make their damages expert available for deposition promptly thereafter. Defendants contend that no other scheduling deadlines need to be modified as Plaintiffs are not entitled to a rebuttal report and the existing schedule is adequate for both parties to prepare for a September 2009 trial date.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motions.

Dated: February 13, 2009

Respectfully submitted,

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